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Submission of Federal Rules Under the Congressional Review Act

☐ President of the Senate

☒ Speaker of the House of Representatives

☐ GAO

Please fill the circles electronically or with black pen or #2 pencil.

1. Name of Department or Agency

Department of Defense

2. Subdivision or Office

OUSD(AT&L)DPAP(DAR)

3. Rule Title

Follow-On Production Contracts for Products Developed Pursuant to Prototype Projects

4. Rule Identification Number (RIN) or Other Unique Identifier (if applicable)
DFARS Case 2002-D023

5. Major Rule ☐ Non-major Rule ☒

6. Final Rule ☒ Other ☐

7. With respect to this rule, did your agency solicit public comments? Yes ☒ No ☐ N/A ☐

8. Priority of Regulation (fill in one)

☒ Economically Significant; or
Significant; or
Substantive, Nonsignificant

☐ Routine and Frequent or
Informational/Administrative/Other
(Do not complete the other side of this form
if filled in above.)

9. Effective Date (if applicable) June 8, 2004 (estimated)

10. Concise Summary of Rule (fill in one or both) attached ☒ stated in rule ☐

Submitted by: Deidre A. Lee (signature)

MAY 24 2004

Name: Deidre A. Lee

Title: Director, Defense Procurement and Acquisition Policy

For Congressional Use Only:

Date Received: _____

Committee of Jurisdiction: _____

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	Yes	No	N/A
A. With respect to this rule, did your agency prepare an analysis of costs and benefits?	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
B. With respect to this rule, at the final rulemaking stage, did your agency			
1. certify that the rule would not have a significant impact on a substantial number of small entities under 5 U.S.C. § 605(b)?	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
2. prepare a final Regulatory Flexibility Analysis under 5 U.S.C. § 604(a)?	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
C. With respect to this rule, did your agency prepare a written statement under § 202 of the Unfunded Mandates Reform Act of 1995?	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
D. With respect to this rule, did your agency prepare an Environmental Assessment or an Environmental Impact Statement under the National Environmental Policy Act (NEPA)?	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
E. Does this rule contain a collection of information requiring OMB approval under the Paperwork Reduction Act of 1995?	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
F. Did you discuss any of the following in the preamble to this rule?	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
• E.O. 12612, Federalism	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
• E.O. 12630, Government Actions and Interference with Constitutionally Protected Property Rights	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
• E.O. 12866, Regulatory Planning and Review	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
• E.O. 12875, Enhancing the Intergovernmental Partnership	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
• E.O. 12988, Civil Justice Reform	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
• E.O. 13045, Protection of Children from Environmental Health Risks and Safety Risks	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
• Other statutes or executive orders discussed in the preamble concerning the rulemaking process (please specify)			

(Billing Code 5001-08-P)

DEPARTMENT OF DEFENSE

48 CFR Part 206

[DFARS Case 2002-D023]

Defense Federal Acquisition Regulation Supplement;

Follow-On Production Contracts for Products Developed Pursuant to
Prototype Projects

AGENCY: Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD has issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to provide an exception from competition requirements to apply to contracts awarded under the authority of Section 822 of the National Defense Authorization Act for Fiscal Year 2002. Section 822 provides for award of a follow-on production contract, without competition, to participants in an "other transaction" agreement for a prototype project, if the agreement was entered into through use of competitive procedures, provided for at least one-third non-Federal cost share, and meets certain other conditions of law.

EFFECTIVE DATE: *[Date of publication in Federal Register]*.

FOR FURTHER INFORMATION CONTACT: Mr. Thaddeus Godlewski, Defense Acquisition Regulations Council, OUSD(AT&L)DPAP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062. Telephone

(703) 602-2202; facsimile (703) 602-0350. Please cite DFARS Case 2002-D023.

SUPPLEMENTARY INFORMATION:

A. Background

Section 845 of the National Defense Authorization Act for Fiscal Year 1994 (Public Law 103-160; 10 U.S.C. 2371 note) provides authority for DoD to enter into transactions other than contracts, grants, or cooperative agreements, in certain situations, for prototype projects that are directly relevant to weapons or weapon systems proposed to be acquired or developed by DoD. Such transactions are commonly referred to as "other transaction" (OT) agreements for prototype projects.

Section 822 of the National Defense Authorization Act for Fiscal Year 2002 (Public Law 107-107) permits award of a follow-on production contract, without competition, to participants in an OT agreement for a prototype project if-

- (1) The OT agreement provided for a follow-on production contract;
- (2) The OT agreement provided for at least one-third non-Federal cost share for the prototype project;
- (3) Competitive procedures were used for the selection of parties for participation in the OT agreement;
- (4) The participants in the OT agreement successfully completed the prototype project;
- (5) The number of units provided for in the follow-on

production contract does not exceed the number of units specified in the OT agreement for such a follow-on production contract; and

(6) The prices established in the follow-on production contract do not exceed the target prices specified in the OT agreement for such a follow-on production contract.

DoD published amendments to the "Other Transactions" regulations at 32 CFR Part 3 on March 30, 2004 (69 FR 16481), to implement Section 822. This DFARS rule provides the corresponding exemption from competition requirements for follow-on production contracts awarded under the authority of Section 822.

DoD published a proposed DFARS rule at 68 FR 33057 on June 3, 2003. Two sources submitted comments on the proposed rule. A discussion of the comments is provided below. The difference between the proposed and final rules is addressed in the discussion of Comment 3 below.

1. Comment: A company may submit a proposal below cost for production during the initial competition in hopes of recovering costs in a sole source environment. The Government should not facilitate recovery of these costs, and this should be addressed prior to finalizing the rule.

DoD Response: This concern is not unique to this rule, but exists in any competition where only one offeror is selected for award. The companion rule at 32 CFR 3.9 requires that the offered prices for production be evaluated during the original

competition. This, coupled with the inherent responsibility of a contracting officer to ensure that contractors honor their commitments, obviates the need for any special DFARS text regarding this concern.

2. Comment: The requirement for production may change such that the prototype no longer represents a clear solution to the Government's needs and, in such a case, other companies should be afforded the opportunity to offer solutions for the production phase. The rule should specify the procedures to be used for such a follow-on competition (e.g., solicit only original competitors, open solicitation).

DoD Response: The companion rule at 32 CFR 3.9 outlines the upfront limitations for use of this authority and specifies in paragraph (c) that the authority should be used only when the risk of the prototype project permits realistic production pricing without placing undue risks on the awardee. This limits use of the authority for higher-risk prototype projects where the production requirement, and thus the pricing, may be less certain. This limitation, coupled with the inherent responsibility of a contracting officer regarding scope determinations, obviates the need to specify any unique scope determination for use of this follow-on authority. Additionally, if the contracting officer determines that the follow-on production is beyond the scope of that originally contemplated, the contracting officer must then develop an acquisition strategy

List of Subjects in 48 CFR Part 206

Government procurement.

Michele P. Peterson,

Executive Editor,

Defense Acquisition Regulations Council.

Therefore, 48 CFR Part 206 is amended as follows:

1. The authority citation for 48 CFR Part 206 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

PART 206--COMPETITION REQUIREMENTS

2. Section 206.001 is amended by adding, after paragraph (b), a new paragraph (S-70) to read as follows:

206.001 Applicability.

* * * * *

(S-70) Also excepted from this part are follow-on production contracts for products developed pursuant to the "other transactions" authority of 10 U.S.C. 2371 for prototype projects when--

(1) The other transaction agreement includes provisions for a follow-on production contract;

(2) The contracting officer receives sufficient information from the agreements officer and the project manager for the prototype other transaction agreement, which documents that the conditions set forth in 10 U.S.C. 2371 note, subsections (f)(2)(A)

and (B) (see 32 CFR 3.9(d)), have been met; and

(3) The contracting officer establishes quantities and prices for the follow-on production contract that do not exceed the quantities and target prices established in the other transaction agreement.